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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

Case No. 1:17-cr-40  
1:18-cr-105  
(LJV)

vs.

February 8, 2019

LAWRENCE RUSSELL, a/k/a MUCHO,

Defendant.

TRANSCRIPT OF SENTENCING  
BEFORE THE HONORABLE LAWRENCE J. VILARDO  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

JAMES P. KENNEDY, JR.  
UNITED STATES ATTORNEY  
BY: TIMOTHY C. LYNCH, ESQ.  
Assistant United States Attorney  
Federal Centre  
138 Delaware Avenue  
Buffalo, New York 14202  
For the Plaintiff

LAW OFFICES OF MARK A. FOTI  
BY: MARK A. FOTI, ESQ.  
16 West Main Street  
Suite 236  
Rochester, New York 14614  
For the Defendant

PROBATION:

NATALIE B. HARRINGTON, USPO

DEPUTY CLERK:

ALLISON P. GIOIA, ESQ.

COURT REPORTER:

ANN M. SAWYER, FCRR, RPR, CRR,  
NYRCR, NYACR, Notary Public  
Robert H. Jackson Courthouse  
2 Niagara Square  
Buffalo, New York 14202  
Ann\_Sawyer@nywd.uscourts.gov

1 (Proceedings commenced at 2:00 p.m.)

2 THE CLERK: All rise. United States District Court  
3 for the Western District of New York is now in session, the  
4 Honorable Lawrence J. Vilardo presiding.

5 THE COURT: Please be seated.

6 THE CLERK: 17-cr-40 and 18-cr-105, United States of  
7 America versus Lawrence Russell.

8 Assistant United States Attorney Timothy C. Lynch  
9 appearing on behalf of the government.

10 Attorney Mark A. Foti appearing with defendant. The  
11 defendant is present.

12 Also present, United States Probation Officer Natalie  
13 Harrington.

14 This is the date set for sentencing.

15 THE COURT: Good afternoon, everyone.

16 MR. LYNCH: Good afternoon, Judge.

17 MR. FOTI: Good afternoon.

18 THE COURT: Before we proceed to sentencing, I want  
19 to address a significant issue that I think has sort of  
20 slipped by everyone here, and it's related to the defendant's  
21 objection under Sentencing Guidelines Section 3C1.3, and  
22 that's to the applicability of both Sections 3146 and 3147 to  
23 the -- the crime of not appearing when the defendant was  
24 required to appear.

25 And the reason that I say that there's an issue that

1 no one seems to have addressed, it's that 3147 provides for an  
2 additional penalty that was not contemplated in the plea  
3 agreement and that the defendant was not told about when he  
4 conducted his plea colloquy.

5 So the maximum penalty, as I understand it, for the  
6 crime -- for the drug crime was 40 -- 40 years; is that right?

7 MR. LYNCH: That's correct, Judge.

8 THE COURT: Okay. And then an additional ten years  
9 under 3146, but then an additional ten years to that if 3147  
10 applies. And the defendant was not told about that.

11 So before we get to the sentencing and before we even  
12 go through with this, I think we need to -- I need to decide  
13 whether 3147 applies and, therefore, whether the 3C1.3  
14 objection is well taken.

15 Do you understand what I'm saying, folks?

16 MR. LYNCH: Yes, Judge.

17 MR. FOTI: Yes.

18 THE COURT: And do you agree that that's an issue?

19 MR. LYNCH: If I can just have a moment, Judge --

20 THE COURT: Yeah.

21 MR. LYNCH: -- to look --

22 THE COURT: Yeah, go ahead.

23 MR. LYNCH: -- at the indictment.

24 THE COURT: Yeah, go ahead.

25 MR. LYNCH: Yeah, Judge, I mean --

1 THE COURT: I'm setting up --

2 MR. LYNCH: -- I agree.

3 THE COURT: -- I'm --

4 MR. LYNCH: Yeah.

5 THE COURT: -- setting up a straw man, Mr. Lynch,  
6 because I'm not going to apply 3147.

7 MR. LYNCH: Yeah, and --

8 THE COURT: And I'm going to explain why I'm --

9 MR. LYNCH: Okay.

10 THE COURT: -- not going to apply 3147.

11 MR. LYNCH: Go ahead.

12 THE COURT: So let me say I've read the papers on  
13 that, Mr. Lynch. I understand the government's position is  
14 that 3C1.3 shouldn't apply simply because of Lawlor.

15 MR. LYNCH: Correct.

16 THE COURT: The defendant has made a more reasoned  
17 argument about it.

18 The probation office has followed the eight circuit  
19 courts that have decided this issue, and I'm going to disagree  
20 with those eight circuit courts, as much as I hate to do that.  
21 But I think there's good reason to do that here, and I want to  
22 explain why.

23 And I think that this is an issue that ought to get  
24 teed up for an appeal.

25 This case, obviously, is not the case on which to

1 appeal it since both sides -- the government because of  
2 Lawlor, the defendant because he thinks he has a good  
3 argument -- have asked for the same thing. So neither side is  
4 going to appeal this. But it's an issue that ought to --  
5 ought to be raised.

6 First of all, I think that the dissents, I recognize  
7 that the 1st, the 3rd, the 4th, the 5th, the 6th, the 7th, the  
8 9th, and the 11th Circuits have all said that 3147 applies in  
9 a 3146 situation. And I read the decisions in those cases,  
10 and I understand where the majority is coming from in the  
11 cases that had a majority, where the unanimous Court is coming  
12 from in the cases that have a unanimous Court.

13 I disagree, however. I think that Judge Nelson in  
14 the Benson case and especially Judge King in the 4th Circuit  
15 in the Fitzgerald case -- and I think it's the 4th Circuit,  
16 yeah -- have the better of that argument.

17 And I think there's something that neither of those  
18 Courts addressed. And that -- and that, for me, tips the  
19 balance. And that is that Section 3146 provides for a  
20 graduated sentencing scheme for defendants who don't show up  
21 for proceedings.

22 So if you fail to appear for an offense that's  
23 punishable for up to 15 -- or, for 15 years or more, you can  
24 get up to ten years.

25 If you fail to appear for a crime that -- that you

1 can get five years or more for, you get five years.

2           If you fail to appear for any other felony, you get  
3 two years.

4           If 3147 applies as well, the most serious offense, 15  
5 years, the -- the -- the penalty would double. The less  
6 serious offense, the middle one, it would triple. The least  
7 serious offense, it would go up by five times, six times, from  
8 two to 12.

9           I can't believe that that's what Congress intended in  
10 light of the fact that they had the graduated sentencing  
11 scheme in 3146.

12           So -- and 3146 and 3147 I understand were passed at  
13 the same time. So I have to believe that 3147 was meant for  
14 other criminal conduct than the failure to appear.

15           And for that reason, and also because both sides are  
16 asking me not to apply the sentencing guideline enhancement in  
17 3C1.3, I am going to find that 3147 does not apply here, the  
18 enhanced penalty in 3147 does not apply here, and the  
19 enhancement in 3C1.3 does not apply here.

20           Does that make sense?

21           MR. LYNCH: Well, it does. I have two things to say,  
22 Judge.

23           THE COURT: Go right ahead.

24           MR. LYNCH: One, I approved this plea, so I didn't  
25 think it applied at the time.

1 THE COURT: Yep.

2 MR. LYNCH: Okay? So that's one thing.

3 Two, I would just ask in the future, Judge, since  
4 this is now an issue, that at least if this issue comes before  
5 you in a different case that you would at least listen to the  
6 government's arguments, you know, that this isn't, like,  
7 absolute, I already decided this in the Russell case,  
8 Mr. Lynch, I don't want to hear any more on this other case.

9 THE COURT: Have you I ever done that to you?

10 MR. LYNCH: No, you wouldn't. But I just with that,  
11 with that understanding --

12 THE COURT: No, and I'll tell you what, I mean, I've  
13 thought this through. I spent more time than I should have on  
14 this over the last several days because it's a very  
15 interesting issue, because I think that it's an important  
16 issue, and because it's not very often that I look at eight  
17 Circuit Court decisions and say that they're wrong.  
18 Especially, you know, being a relatively new district judge  
19 and still not having the self confidence to do that.

20 But I think that that's -- I think, especially based  
21 on this latest observation that I -- that I had, I think it's  
22 right. And -- and -- and I don't think anyone has considered  
23 that graduated sentencing scheme.

24 So I will always listen to you, Mr. Lynch.

25 MR. LYNCH: Okay. I just wanted to make sure.

1                   THE COURT: And I haven't, you know, I haven't  
2 thought this through so much and researched it so much that  
3 what I'm saying I'm positive is the final word on this. I'm  
4 just telling you that right now, that's what I think is  
5 correct.

6                   MR. LYNCH: Perfect.

7                   THE COURT: And I think that it works for this case,  
8 as well.

9                   MR. LYNCH: That's fine. Thanks, Judge.

10                  THE COURT: Okay?

11                  MR. LYNCH: I appreciate it, Judge.

12                  THE COURT: Mr. Foti, I'm sure you're fine with  
13 everything I just said.

14                  MR. FOTI: I am, yes.

15                  THE COURT: Okay. Terrific. So let's now proceed to  
16 the sentencing.

17                  Mr. Russell is before the Court for sentencing on his  
18 previous pleas of guilty to Count 1 of the indictment in  
19 17-CR-40, and that charged that he conspired to possess with  
20 intent to distribute and to distribute 500 grams or more of  
21 cocaine and 28 grams or more of cocaine base in violation of  
22 21, United States Code, Section 846; and Count 1 of the  
23 indictment in 18-CR-105, and that charged that he failed to  
24 appear after his pretrial release in violation of Title 18,  
25 United States Code, Section 3146.

1                   We're going to begin with some questions that I have  
2 for the lawyers and for you, Mr. Russell, about the  
3 presentence investigation report. I'm then going to make sure  
4 that I've received and read all the sentencing-related  
5 submissions. After that, I'm going to hear from the  
6 attorneys -- from your attorney regarding his other objections  
7 that I have not resolved already. And then I plan to make  
8 some findings of fact, calculate the applicable guidelines  
9 range, and then listen to counsel for both sides and you tell  
10 me what you think is relevant to sentencing in this case.

11                   So are there any questions before we begin from the  
12 government?

13                   MR. LYNCH: No, Judge.

14                   THE COURT: From the defense?

15                   MR. FOTI: No, Judge.

16                   THE COURT: Okay. Mr. Foti, have you had enough time  
17 to read the presentence report prepared on October 11th, 2018,  
18 revised on December 21st, 2018, and revised again on  
19 January 7th, 2019 and to review it with your client?

20                   MR. FOTI: Yes.

21                   THE COURT: And, Ms. Harrington, do I have those  
22 dates correct?

23                   USPO HARRINGTON: That's correct, Your Honor.

24                   THE COURT: And there's been no further -- there have  
25 been no further revisions since January 7th, 2019; is that

1 right?

2 USPO HARRINGTON: That is correct.

3 THE COURT: Okay. Mr. Foti, did you explain the  
4 contents of the report to Mr. Russell?

5 MR. FOTI: I did.

6 THE COURT: Do you have any concerns about his  
7 ability to understand it?

8 MR. FOTI: No.

9 THE COURT: Mr. Russell, did you receive a copy of  
10 the report that was prepared on October 11th, revised on  
11 December 21st, that's both in 2018, and then revised again on  
12 January 7th, 2019?

13 THE DEFENDANT: Yes, Your Honor.

14 THE COURT: Did your attorney explain it to you?

15 THE DEFENDANT: Yes, Your Honor.

16 THE COURT: Do you understand it?

17 THE DEFENDANT: Yes, Your Honor.

18 THE COURT: Do you need more time to talk to your  
19 lawyer about it?

20 THE DEFENDANT: No, Your Honor.

21 THE COURT: Do you have any questions about it?

22 THE DEFENDANT: No, sir.

23 THE COURT: Okay. Mr. Foti, other than the  
24 objections that we'll get to in a minute, the unresolved  
25 objections that we'll get to in a minute, does the defendant

1 want to contest or change anything in the presentence report?

2 MR. FOTI: Nothing further, Judge.

3 THE COURT: Okay. And that includes both the facts  
4 in the report, as well as the guidelines calculation; is that  
5 right?

6 MR. FOTI: Yes.

7 THE COURT: Mr. Russell, other than the objections  
8 that Mr. Foti has raised, do you want to contest or change  
9 anything in the report?

10 THE DEFENDANT: No, Your Honor.

11 THE COURT: Mr. Lynch, does the government want to  
12 contest or change anything in the report?

13 MR. LYNCH: No, Your Honor.

14 THE COURT: And that includes both the facts and the  
15 guidelines calculations; is that right?

16 MR. LYNCH: Yes. Well --

17 THE COURT: Other than --

18 MR. LYNCH: -- yeah, our Lawlor statement.

19 THE COURT: Other than what we resolved already?

20 MR. LYNCH: Yeah.

21 THE COURT: Yes.

22 MR. LYNCH: Okay.

23 THE COURT: Yeah, I got it. No, no. I'm not trying  
24 to trick you. We've resolved that already.

25 MR. LYNCH: All right.

1 THE COURT: So --

2 MR. LYNCH: I wanted to make sure. Yes. Then no,  
3 Judge.

4 THE COURT: No, I understand. Thank you.

5 So, Mr. Foti, I've received and reviewed the  
6 defendant's objections to the presentence report and  
7 sentencing memorandum, the sentencing letter from the  
8 defendant, and then two sets of documents that are labeled  
9 notice of motion and letters in support with letters written  
10 by: Linda Lewis Russell, his mother; two letters from Yvonne  
11 Bailey Meadows, his sister; a letter from Sergeant Anthony B.  
12 Russell, his oldest living brother; from Denise Sharelle Moss  
13 Bailey, his oldest sister; from Tamalla Daniel, his fiancée;  
14 from Rudy Thomas; and then two letters from his minor children  
15 who, because they are minors, I'm not going to name on the  
16 record.

17 And then there's also a certificate of completion of  
18 the Willard Drug Treatment Campus Program from the New York  
19 State Department of Corrections and Community Supervision.

20 Is that everything?

21 THE DEFENDANT: No, Your Honor.

22 THE COURT: It's not? What --

23 MR. FOTI: May I have a moment?

24 (Off the record at 2:12 p.m.)

25 (Back on the record at 2:15 p.m.)

1 MR. FOTI: Judge, there were two things that  
2 Mr. Russell brought to my attention. One was in a package  
3 that was delivered directly to the Court. I have been  
4 provided the original copies. It deals with documentation  
5 regarding sobriety that he was maintaining while he was on  
6 pretrial release up to the point of the final violation.

7 And I asked him if he's comfortable with me  
8 discussing that on the record when it comes time for us to  
9 provide comments for the Court's consideration, and he said he  
10 is.

11 The other -- the other item is a letter written by  
12 Mr. Russell which was, I think, also sent to the Court.

13 THE COURT: I referred to that.

14 THE DEFENDANT: Oh.

15 MR. FOTI: Oh.

16 THE COURT: Yeah, I have the defendant's sentencing  
17 letter, yeah.

18 MR. FOTI: Those were the only two items. So I think  
19 at this point we're ready to proceed.

20 THE COURT: Yep, I've read his letter. Okay, good.  
21 Great. So there's nothing else then?

22 MR. FOTI: No, Your Honor.

23 THE COURT: Terrific. Great. Thank you.

24 And is there anything else you'd like to submit now  
25 in writing?

1 MR. FOTI: No.

2 THE COURT: Okay. Mr. Lynch, I've received the  
3 government's statement with respect to sentencing factors and  
4 the government's response to the defendant's objections and  
5 sentencing memorandum --

6 MR. LYNCH: Correct.

7 THE COURT: -- is that everything?

8 MR. LYNCH: That is, Judge.

9 THE COURT: And is there anything else the government  
10 would like to submit in writing?

11 MR. LYNCH: No, Your Honor.

12 THE COURT: Okay. Let's talk about the objections.  
13 We've already addressed one of the objections, but I'm going  
14 to address the other two now.

15 First, the defendant objects to the application of --  
16 I'm sorry, the defendant objects to the inclusion of  
17 paragraphs 62 through 69 of the presentence report insofar as  
18 they detail arrests for which the charges were dismissed,  
19 sealed or unsupported by the record of disposition.

20 The government takes the position that those details  
21 are properly included in the presentence report, and that the  
22 Court can consider that information.

23 And Mr. Foti also objects to one of the paragraphs in  
24 paragraph 62 through 69, that is specifically paragraph 68,  
25 and that purports to detail a year 2000 arrest for assault and

1 harassment. And the objection is that the defendant claims  
2 that he was never charged with assault and, in fact, that he  
3 does not recall either the incident or an individual alleged  
4 to be -- to have been involved with the initials SM.

5 And the government's response states that there's  
6 sufficient indicia of reliability to support the accuracy of  
7 the information and, therefore, that the information should  
8 remain in the report.

9 Do I have the objections and the government's  
10 response correct?

11 MR. FOTI: Yes.

12 MR. LYNCH: Yes, Your Honor.

13 THE COURT: So with respect to the inclusion of the  
14 details relating to arrests for charges that were dismissed,  
15 sealed or unsupported in paragraphs 62 through 69, those  
16 objections are overruled.

17 Title 18, United States Code, Section 3661 provides  
18 that there's no limit to the information concerning the  
19 background, character and conduct of a defendant that I may  
20 receive and consider for purposes of imposing sentence.

21 The presentence report notes which of those arrests  
22 are sealed and which are dismissed, and those that there's no  
23 record of any disposition. And I can tell you that if a case  
24 is dismissed and charges have not been proven against a  
25 defendant, I -- I understand that, Mr. Foti, I practiced law

1 for a lot of years and I know that charges can be placed that  
2 are not legitimate charges. And when charges are placed and  
3 dismissed or sealed or otherwise disposed of in a way that is  
4 not to the defendant's disadvantage, I consider that, but I  
5 can tell you I've never increased a defendant's sentence based  
6 on charge -- unproven charges.

7 I take into account, you know, I take into account  
8 things like how many times a person has been arrested. I  
9 think that's a legitimate thing for a judge to take a look at.

10 But when it's an unresolved charge or a dismissed  
11 charge, it never tips the balance for me to impose a higher  
12 sentence.

13 So I think they belong in the report. I think that  
14 probation was just doing its job and correctly includes them  
15 in the report. But -- and so I'm overruling your objection.  
16 But you should not be concerned about whether those things are  
17 going to tip the balance to a higher sentence.

18 With respect to paragraph 68, you state that  
19 Mr. Russell has no recollection about that and no recollection  
20 of those initials.

21 Again, the information in that paragraph is not going  
22 to affect the sentence that I impose. But I'm going to keep  
23 it in the report, especially because the probation officer  
24 included your objection in the addendum to the report. So  
25 both the charge, which again was an unresolved charge if I

1 recall correctly, and your explanation that the defendant  
2 doesn't think it's him, are both in the report.

3 And I think Mr. Lynch is correct that there's  
4 sufficient indicia of reliability to keep it in the report,  
5 but the Bureau of Prisons will have your explanation of that.  
6 So we're going to keep it in, but it's not going to affect the  
7 sentence that I'm going to impose.

8 And I've already ruled and sustained the third  
9 objection.

10 So have we covered all the objections now, Mr. Foti?

11 MR. FOTI: Yes.

12 THE COURT: Okay. Anything further you would like to  
13 say on any of them?

14 THE DEFENDANT: No. No, Your Honor.

15 MR. FOTI: We're all set.

16 THE COURT: Great. Okay. Mr. Lynch, anything  
17 further you would like to say?

18 MR. LYNCH: No, Judge.

19 THE COURT: I previously accepted the defendant's  
20 pleas of guilty to Count 1 of indictment 17-CR-40, conspiracy  
21 to possess with intent to distribute and conspiracy to  
22 distribute 500 grams or more of cocaine and 28 grams or more  
23 of cocaine base; and Count 1 of indictment 18-CR-105, that the  
24 defendant failed to appear while he was on pretrial release.

25 At that time I deferred acceptance of the plea

1 agreement. I now accept the terms and the conditions of the  
2 plea agreement that was signed on July 26th, 2018, and the  
3 judgement and sentence will be consistent with it.

4 I note that in the plea agreement, the government has  
5 moved to dismiss or will move to dismiss the open counts of  
6 the indictment against the defendant, so I also find that the  
7 charges to which the defendant pled guilty, that is Count 1 of  
8 17-cr-40 and Count 1 of 18-cr-105, adequately reflect the  
9 seriousness of the actual offense behavior, and that accepting  
10 the agreement is not going to undermine the statutory purposes  
11 of sentencing or the guidelines.

12 Specifically, Counts 2 through 9 of indictment  
13 17-cr-40 charge that possession with intent to distribute and  
14 distribution of cocaine and cocaine base, based on certain  
15 specified dates, all of which fall within the time frame of  
16 the conspiracy to which the defendant pled guilty, and in  
17 addition all of which are accounted for in the total weight of  
18 the drugs in the sales, and that's included in the conspiracy  
19 to which the defendant pleaded guilty, and with respect to  
20 Count 10 of 17-cr-40, maintaining a drug-involved premises,  
21 the base offense level has been increased two levels for that  
22 conduct. With respect to 18-cr-105, the defendant has pleaded  
23 guilty to all relevant conduct.

24 So I think that the plea agreement and the pleas are,  
25 in fact, consistent with both the guidelines and the statutory

1 purposes of sentencing in 3553.

2                   The government has filed a statement with respect to  
3 sentencing factors accepting the Probation and Pretrial  
4 Service Office's presentence report. The defendant has not  
5 filed a statement with respect to sentencing factors and has  
6 raised certain objections that have now been resolved.

7                   But based on the parties' submissions and their  
8 representations today in court, other than some of the factual  
9 issues on which I've already ruled, the parties do not dispute  
10 the facts included in the presentence investigation report.

11                  I've reviewed that report, as well. Based on my  
12 review, based on the parties' written submissions, based on  
13 the positions taken on the record today, and based on my  
14 rulings on the defendant's objections, I adopt the facts in  
15 the report as my findings of fact and I incorporate them into  
16 the record.

17                  I'm now going to place the January 7th, 2019  
18 presentence investigation report in the record under seal.

19                  If an appeal is filed, counsel on appeal will be  
20 given access to the sealed report except that counsel on  
21 appeal will not be given access to the recommendations  
22 section.

23                  So let's now turn to the guidelines which I must  
24 calculate and consider as an important part of my  
25 determination of a sentence. And I apologize to everybody in

1 the courtroom for the technical nature of what's about to  
2 follow, but the guidelines themselves and the reasons behind  
3 the guidelines make this a necessary step in the process.

4 So based on the parties' submissions and their  
5 representations today in court, there are also no disputes  
6 regarding the recommendations in the report as to the  
7 applicable sections of the Sentencing Commission's advisory  
8 guidelines except for the three-level enhancement that I have  
9 decided is not going to apply. That's the only difference  
10 that the parties have with respect to the calculations.

11 So let me recite what the calculations in the report  
12 are and what my findings are.

13 Under Section 3D1.2, Count 1 of 17-cr-40 and Count 1  
14 of 18-cr-105 are grouped for guideline calculation purposes  
15 because the failure to appear count is treated as a specific  
16 offense characteristic of the narcotics conspiracy count.

17 Application note 3 of Section 2J1.6 instructs that in  
18 the case of a conviction on both the underlying offense and  
19 failure to appear, other than in a case of failure to appear  
20 for service of a sentence, the failure to appear is treated  
21 under 3C1.1 as an obstruction of the underlying offense, and  
22 the failure to appear count in the count for the underlying  
23 offense are grouped together under 3D1.2(c). So that's what  
24 the presentence report says.

25 The presentence report then calculates under the 2018

1 versions of the guidelines manual that Sections 2D1.1(a) (5)  
2 and 2D1.1(c) (8) provide for a base offense level of 24.

3 The report then recommends the offense level be  
4 increased by two levels under Section 2D1.1(b) (1), because the  
5 investigation revealed that on May 7th, 2014, the defendant  
6 possessed a handgun. 24 plus 2 is 26.

7 The presentence investigation report then recommends  
8 that the offense level be decreased by another two levels  
9 under Section 2D1.1(b) (12), because the defendant maintained a  
10 premise, that is 165 14th Street, Buffalo, New York, for the  
11 purpose of manufacturing or distributing a controlled  
12 substance. 26 plus 2 is 28.

13 The report then recommends that the offense level be  
14 increased by another two levels under Section 2J1.6,  
15 application note 3, and 3C1.1, because the defendant willfully  
16 obstructed or impeded or attempted to obstruct or impede the  
17 administration of justice. 28 plus 2 is 30.

18 The presentence report then recommends that the  
19 offense level be increased by another three levels under  
20 Title 18, United States Code, Section 3147 and guidelines  
21 3C1.3 because the defendant committed Count 1 of 18-cr-105  
22 while on release. The presentence investigation report  
23 calculates that the offense level then becomes 33. 30 plus 3  
24 is 33.

25 As I said at the beginning of this proceeding, I'm

1 not going to apply that, so I'm not adding that three-level  
2 increase in, but right now I'm reciting what the presentence  
3 report says.

4 The presentence report then recommends that the  
5 offense level be decreased by two levels under  
6 Section 3E1.1(a) of the guidelines, because the defendant  
7 accepted responsibility for his conduct.

8 And in its statement with respect to sentencing  
9 factors, the government moved for an additional one-level  
10 decrease of the offense level under Section 3E1.1(b), and I  
11 grant that motion by the government.

12 So the presentence report calculates the defendant's  
13 total offense level to be 30. 33 minus 3 is 30.

14 And the report calculates the defendant's criminal  
15 history category to be IV based on the defendant's criminal  
16 history score of 9.

17 Based on my factual findings, I agree with all the  
18 report's calculations with respect to the criminal history  
19 category, but I disagree with the calculation of the offense  
20 level because I find that the three-level enhancement under  
21 Section 3C1.3 does not apply. So the Court's calculation is  
22 that the total offense level is 27.

23 Presentence report calculates that with a total  
24 offense level of 30 and a criminal history category of IV, the  
25 applicable guidelines range would be a sentence of

1 imprisonment of 136 to 168 months, a fine range of \$30,000 to  
2 \$5 million, and a period of supervised release of four to five  
3 years with mandatory special assessments of \$100 on each count  
4 that I must impose for a total of \$200.

5 But the Court finds that with a total offense level  
6 of 27 and a criminal history Category IV, the applicable  
7 guidelines range is a sentence of imprisonment of 100 to 125  
8 months, a fine range -- and I think this is right although I  
9 was going to ask my law clerk about this and didn't, so I'm  
10 getting a little scary here trying to do this myself, but I  
11 think it's \$25,000 to \$5 million?

12 THE CLERK: No.

13 THE COURT: No?

14 MR. LYNCH: Yeah. A 27 is \$25,000.

15 THE CLERK: Yes, but that's under the -- don't we use  
16 the old guidelines? What's the date of the crime?

17 MR. LYNCH: The crime was 2014 through '15, and I  
18 think --

19 THE CLERK: Concluding?

20 MR. LYNCH: Concluded in January 2015.

21 THE CLERK: Right. So we use the old time table,  
22 which I have at my desk.

23 THE COURT: Do you want to go get it? Okay. Go  
24 ahead. Yeah, I want to get it right. I mean, I know it's not  
25 a particularly big deal here, but I like to get these things

1 right. And I know it's dangerous when I do these calculations  
2 on my own.

3 MR. LYNCH: Well, you know what? I have it in my  
4 calendar. I put it down, like, because I can't remember when  
5 the book changed on the fine, so I wrote it down. It's either  
6 1/11 -- 11/1/2015 or 11/1/2014, I can't remember. But --

7 THE COURT: They didn't tell me being a judge would  
8 involve so much math.

9 THE CLERK: Right. We use the old fine table.

10 USPO HARRINGTON: Correct.

11 THE CLERK: So for an offense level of 27, the fine  
12 range is 12,500 to whatever the --

13 THE COURT: To 5 million.

14 THE CLERK: -- to 5 million.

15 THE COURT: Okay. So with an offense level as the  
16 Court finds of 27 and a criminal history score of Category IV,  
17 the sentence of imprisonment under the guidelines would be  
18 between 100 and 125 months, a fine between \$12,500 and  
19 \$5 million, a period of supervised release of four to five  
20 years, and the mandatory special assessments of \$100 on each  
21 count for a total of \$200.

22 MR. LYNCH: Judge, I hate to -- but then the  
23 obstruction -- the failure to appear count, which actually  
24 carries the same base offense level as the conduct that was  
25 the, you know, the underlying criminal conduct, that occurred

1 in 2017.

2 THE CLERK: Oh.

3 MR. LYNCH: So that's why the new book applies.

4 THE COURT: So I was right when I said --

5 MR. LYNCH: You were.

6 THE CLERK: Yeah. Sorry, Judge.

7 THE COURT: That's okay.

8 MR. LYNCH: Just, of course, the minute you start  
9 talking, it starts processing in my brain. I'm sorry.

10 THE COURT: So let's do it one more time.

11 With a final total offense level of 27, and a  
12 criminal history Category IV, the guidelines are as follows:  
13 a sentence of imprisonment of between 100 and 125 months, a  
14 fine of between 25,000 and \$5 million, and a period of  
15 supervised release of four to five years, with a mandatory  
16 special assessment of \$100 on each count, for a total of \$200  
17 that I must impose.

18 And those are my calculations of the guidelines. Any  
19 objections to those calculations?

20 MR. LYNCH: No, Judge.

21 MR. FOTI: No, Judge.

22 THE COURT: Okay. Mr. Russell, under the Supreme  
23 Court's decision in United States versus Booker and the  
24 2nd Circuit's decision in United States versus Crosby, the  
25 Court must consider the guidelines but it's not bound by them.

1                   The Court also must consider the factors that are  
2 included in 18, United States Code, Section 3553(a). Those  
3 factors include: the nature and circumstances of the offense;  
4 your history and characteristics; the need for the sentence to  
5 reflect the seriousness of the offense, to promote respect for  
6 the law and to provide a fair punishment to you; the need to  
7 deter others from committing crimes and to protect the public  
8 from your crimes; the need to provide you with educational or  
9 vocational training in an attempt to rehabilitate you; the  
10 types of sentences that are available; any policy statements  
11 issued by the Sentencing Commission; sentences given to others  
12 who committed crimes similar to the one to which you pleaded  
13 guilty; and the need for restitution to victims.

14                   I'm going to take all those factors into account when  
15 I pronounce sentence, but before I do, I want to give the  
16 attorneys and you a chance to talk to me about anything you  
17 think is relevant to sentencing.

18                   So we're going to start with the government.

19                   Mr. Lynch, does the government want to say anything?

20                   MR. LYNCH: Thank you, Judge. As the Court's aware,  
21 the parties pursuant to the plea agreement agreed to the  
22 guidelines and they agreed that they would not argue outside  
23 the guidelines for any departures.

24                   In addition, the government agreed that it would not  
25 oppose a sentence at the low end of the range which is 100

1 months.

2                   The defendant is 41 years old. He stands before you,  
3 Judge, with a criminal history that spans 26 years. It  
4 started at the age of 15. During that period of time, he has  
5 already served two substantial prison terms. He served a  
6 period of about 18 months, and then he recently served -- was  
7 sentence to a prison term of four years. I realize he didn't  
8 serve that entire time because he was at the Willard Drug  
9 Treatment Program, but those are significant sentences that  
10 were imposed, and those haven't changed the defendant's  
11 behavior.

12                  Unfortunately, I realize he's had some difficulties  
13 in his life, and I'm sure that drugs and alcohol have been at  
14 least a partial reason for his criminal conduct.

15                  But if you look at the underlying conduct in this  
16 case, Judge, it's not just one simple drug sale. This is a  
17 drug conspiracy that spanned two years. A substantial amount  
18 of cocaine and crack cocaine were sold by the defendant and  
19 his coconspirator, John Nelson. And during that time he  
20 engaged, you know, he had a firearm, and he admitted to that.

21                  So, not only do we have a significant amount of  
22 drugs, but we also have introduced into this conspiracy the  
23 possession of firearms which only creates a more substantial  
24 danger to the public.

25                  Finally, Judge, you know, we have a defendant who

1 fled while on release. He was given certainly the benefit of  
2 believing that he would show up in court, that he would make  
3 appearances.

4 And I realize he may have at one point fled in an  
5 instant, but there was a long time on release -- or, I'm  
6 sorry, a long time on the run, and it was only through the  
7 efforts of the United States Marshal Service as well as the  
8 U.S. Attorney's Office seeking judicial orders where we were  
9 actually able to locate him. And then when they did, the  
10 United States Marshal Service was able to take him into  
11 custody.

12 And that has to, I think, Judge, be a significant  
13 factor in determining what the sentence is in this case.

14 And when you look at his criminal history, Judge, his  
15 involvement in this serious offense, his obstruction of  
16 justice by fleeing, I do believe and the government believes  
17 that a 100 month sentence would be appropriate in this case.

18 THE COURT: Thank you. There are no identifiable  
19 victims -- well, there actually is a victim, the manufacturer  
20 of the ankle bracelet.

21 MR. LYNCH: Oh --

22 THE COURT: I don't know if they're really a --

23 MR. LYNCH: Yeah, I don't know.

24 THE COURT: No victims here want to speak, right?

25 MR. LYNCH: No.

1 THE COURT: Go ahead, Mr. Foti.

2 MR. FOTI: Thank you, Judge. I would agree with the  
3 government and in regards and as well as the evidence that is  
4 before the Court on the issue of whether alcohol and substance  
5 abuse has been a factor here for the Court's consideration.

6 I would go further and say it's really the primary  
7 factor that has affected Mr. Russell and the decisions that he  
8 has made. And both the -- I guess what I'd like to convey in  
9 my statements here is that Mr. Russell has consistently sort  
10 of demonstrated two different characters and qualities that go  
11 with those opposing adverse characters. One is -- one is that  
12 he is a good father, he is a good family member. His sister  
13 who is in the courtroom today speaks to that. Good son,  
14 reliable, caring, big heart.

15 All of those things seem to be reflected in  
16 everything I've seen throughout this case. You know, but for  
17 the criminal conduct that he engaged in he has been a  
18 significant person in the lives of his family members,  
19 specifically his kids.

20 And although the mother of his children was affected  
21 by the obstruction of justice charge and the conduct related  
22 to it, she stood by him in respect to, she maintained  
23 consistently, he has nonetheless been a very, very good  
24 father. And it is significant to her kids that he continue to  
25 be able to be involved in their lives in some respect.

1           I think that -- the fact that she didn't take a  
2 position that she wanted him locked up and away from her kids  
3 after having been personally affected by one of the mistakes  
4 that took place, I think that's speaks to the fact that there  
5 are a lot of positive qualities that he has demonstrated those  
6 closest to him are familiar with, and results in them  
7 continuing to stand by him knowing that there is good  
8 character in there, that there is significant amount of  
9 potential in there.

10           And I'd like to say that in regards to the  
11 obstruction, I know it is a consideration before the Court,  
12 not just because he pled to it, but because it's significant  
13 to the factors that the Court has to weigh.

14           But I would note that Mr. Russell did not demonstrate  
15 he was going to flee at the first opportunity. And I don't  
16 just point that out because there was a period of time where  
17 he maintained compliance with pretrial release, but I also  
18 refer back to August of 2017 when a mistake was made and when  
19 he was released from Willard after I think he successfully  
20 completed the program, he had no court date. He was actually  
21 supposed to go into federal custody and he didn't, he didn't  
22 lapse into federal custody. He was released, which was an  
23 error, apparently. And he -- rather than realize that there  
24 was a mistake and he was now released and attempt to flee at  
25 that moment, he did something which I think is the right thing

1 to do but not necessarily what everybody else under his  
2 circumstances would have done, and he contacted me and said I  
3 need to get in front of the Court because I've been released  
4 here and I know I still have the pending federal charge.

5 And I discussed it with him and explained there's a  
6 good chance you could go back in because I think this appears  
7 to be a mistake. Absent a detention hearing, you very well  
8 may. And you may go back into custody in the interim, and you  
9 may ultimately end up in custody following the detention  
10 hearing. And I, of course, I advised him that nonetheless  
11 that's what we should do.

12 But knowing full well the circumstances, he, you  
13 know, followed through. Directed me to do exactly what we're  
14 supposed to do, and get him into court, and he showed up to  
15 court willingly. And we had our detention hearing, and he was  
16 given the opportunity to be released and continue his efforts  
17 to maintain sobriety.

18 And I think that speaks to the good character, the  
19 aspect of Lawrence Russell that wants to do the right thing.  
20 I think that was an extraordinary effort on his part to  
21 demonstrate to the Court that he wanted to do the right thing.  
22 And it stands in sharp contrast to what happens several months  
23 later when after several relapses -- or, I believe, two  
24 relapses. In the second relapse, the wheels come off. He  
25 makes a mistake that he sort of carries on over the course of

1 a number of months, and ultimately leads to his arrest on the  
2 obstruction of justice charge.

3 He feels the effect of that. It certainly weighs in  
4 the fact that he had to plea to an additional charge and that  
5 it affected his guidelines, and we're not allowed pursuant to  
6 our plea agreement to advocate for a sentence outside of those  
7 guidelines.

8 But I would note that what ultimately took place in  
9 this case seems to be consistent what my point is, is that  
10 Mr. Russell has a whole lot of potential. And when he is  
11 sober, after completing the Willard program, for example, and  
12 doing good, he has every intention of doing the lawful thing  
13 and the right thing. And it's only when alcohol gets involved  
14 again that he starts to go down a different road.

15 And he has not suggested that he's unaware of this.  
16 He has not refused to comply with treatment.

17 The presentence investigation report and probation, I  
18 think it's consistently demonstrated that he was in compliance  
19 for the most part after his release.

20 He was diagnosed with severe alcohol abuse -- or,  
21 severe alcohol disorder, and that was on August 29, 2017. And  
22 he, after as of September 3rd, 2017, maintained sobriety until  
23 he relapsed in November. And what Horizon had communicated,  
24 and this was in the materials that Mr. Russell brought today  
25 and I've had a chance to review, when he had his relapse in

1 November, he was upfront about it with his probation officer,  
2 and the indication was he responded to his relapse in a  
3 positive way, was able to continue to comply with treatment  
4 recommendations, and got back on the right course until the  
5 subsequent relapse.

6                   Everything I've said is consistent with what his  
7 family has told me. They all, out of concern for him, know  
8 that alcohol, in particular, has been a demon that has  
9 followed him, and it has affected him in some of the decisions  
10 that he's made along the way.

11                  They all care for him. The fact that they took time  
12 to write letters demonstrate that. The content of the letters  
13 I think is consistent with what I'm seeing today. They all  
14 demonstrate, they see great potential in him, but are aware  
15 that he's made bad decisions along the way particularly when  
16 he loses control of his sobriety, which is an ongoing struggle  
17 for him and will continue to be an ongoing struggle.

18                  I noted following the objections in document 110, I  
19 did refer to the factor of 18 U.S. Code Section 3553(a) (2) (D)  
20 which talks about the need for education, vocational training,  
21 medical care, treatment. And I do think that we recognize a  
22 sentence of imprisonment would -- would allow for continued  
23 efforts towards that treatment, and hopefully upon release he  
24 will have gotten control of that and will be able to put his  
25 life in a different direction.

1                   I'd ask the Court to consider that be the focus of a  
2 rehabilitative effort here is his continued treatment related  
3 to his alcoholism. And I -- I can only ask for the sentence  
4 of 100 months consistent with what the government has agreed  
5 not to object to. I believe that's a significant amount of  
6 time. And I hope the Court will consider all the factors, and  
7 particularly Mr. Russell's continued efforts towards dealing  
8 with his sobriety and the amount of time that it would take to  
9 go to that effort in order to secure that Mr. Russell, the  
10 character that has been positive and a good family member and  
11 a good father, can really hopefully shine upon his release and  
12 do some good when that time comes.

13                   THE COURT: Okay. Before I hear from Mr. Russell, I  
14 want to ask: My clerk advised you that I'm considering  
15 imposing a mental health condition in addition to the  
16 conditions that are included in the presentence report. Do  
17 you have anything you want to say about that? Any objection  
18 you'd like to raise to that?

19                   THE DEFENDANT: No, sir.

20                   MR. FOTI: No, Judge. And the materials have  
21 demonstrated that Mr. Russell's experienced trauma in his  
22 past, and I think actually --

23                   THE COURT: Well, his brother's letter is -- and I'll  
24 get into this when I give the reasons for the sentence -- but  
25 his brother's letter is the one. I wasn't going to impose a

1 condition of mental health until I read the letter from his  
2 brother, Sergeant --

3 THE DEFENDANT: Anthony?

4 THE COURT: Yeah. That letter made basically a plea  
5 for some mental health treatment. And when I saw that, I  
6 said, you know, here's somebody who knows him pretty well --

7 MR. FOTI: Right.

8 THE COURT: -- who says there's some PTSD and some  
9 depression that needs to be addressed, so thank you for that.

10 Okay. Mr. Russell, anything you would like to say?

11 THE DEFENDANT: Yes, sir. Actually, I have something  
12 that I would like that read.

13 THE COURT: You go right ahead.

14 THE DEFENDANT: Okay. My name is Lawrence Matthew  
15 Russell, Jr., I'm 41 years old, I'm an alcoholic and a  
16 substance abuser. And as of July 26th, 2018, I'm a convicted  
17 nonviolent federal drug offender. But that's not all I am.

18 I'm also a son, the youngest boy of seven children; a  
19 brother; an uncle; a great uncle; a father of three biological  
20 children, two nonbiological, three grand kids; a provider; a  
21 fiancé; a teacher; a mentor; a counselor; a coach; a neighbor;  
22 a hard worker; and a friend.

23 I could go on, but I also want you to know what I'm  
24 not: I'm not a threat. I'm not a menace, a burglar, a con  
25 artist, a pedophile, a terrorist, a woman beater, a gang

1 banger, a rapist, or a killer.

2 I'm just a human being that has made a few bad  
3 mistakes in my life.

4 I could stand here and say we have all made bad  
5 mistakes, but I can't speak for everyone else, so I'm going to  
6 leave it on the "I." I have made some bad decisions in my  
7 life.

8 I could also stand here and make excuses, justify or  
9 point the finger at others. However, I was taught as a child  
10 when you point the finger, there's always three pointing back.

11 So I stand here today to accept responsibility for my  
12 actions, and I have faith that I will be judged fairly and  
13 that my punishment will not exceed the crime. Whatever the  
14 outcome, I will accept my sentence gracefully.

15 Thank you, Your Honor.

16 THE COURT: Thank you.

17 Okay. Does either counsel know of any reason why  
18 sentence should not now be imposed?

19 MR. LYNCH: No, Your Honor.

20 MR. FOTI: No.

21 THE COURT: Okay. Pursuant to the Sentencing Reform  
22 Act of 1984, the 2008 version of the guidelines, it's the  
23 judgement of the Court that the defendant Lawrence Russell is  
24 hereby sentenced to aggregate sentence of 108 months of  
25 imprisonment broken down as follows:

1                   84 months on Count 1 of 17-cr-40, and 24 months of  
2 imprisonment on Count 1 of 18-cr-105, to run consecutive to  
3 the term of imprisonment imposed on Count 1 of 17-cr-40 for an  
4 aggregate sentence of 108 months of imprisonment. The cost of  
5 incarceration fee is waived.

6                   I recommend very strongly that the defendant be  
7 placed in the RDAP program which may result in his serving  
8 less time than the sentence that I'm imposing. I'm going to  
9 get to the reasons in a second why I imposed a little bit  
10 higher of a sentence than both sides asked me to impose, but  
11 why I'm recommending a RDAP which I hope will result in your  
12 serving even less time than even the lower sentence would be.

13                  And I'm recommending that the defendant be placed in  
14 a facility that has the RDAP program and that also has the  
15 mental health wherewithal to provide the mental health  
16 counseling that he needs.

17                  And then after both of those considerations are taken  
18 into account, that he be placed in a facility as close to  
19 Western New York as possible so that he can have access to his  
20 family members.

21                  MR. FOTI: Judge, just on the last point?

22                  THE COURT: Yeah, go ahead.

23                  MR. FOTI: My client did indicate to me in advance,  
24 and I -- we would join in that recommendation, and we don't  
25 have any opposition to that being the primary factor.

1 THE COURT: The RDAP and the mental health?

2 MR. FOTI: Yes.

3 THE COURT: Yeah.

4 MR. FOTI: That would be our request for first  
5 consideration of his location of imprisonment. But beyond  
6 that, we would actually ask that if any geographical  
7 considerations are taken, that it be in a facility in North  
8 Carolina. That is closest to a number of family members that  
9 he has over there.

10 THE COURT: Terrific. Yeah. And so I will recommend  
11 that he be placed as close to his family in North Carolina as  
12 possible. I want to make it as easy as possible for your  
13 family to visit you, and I think that that's going have a  
14 positive influence on you, as well. So that's the idea behind  
15 that. So if North Carolina is the best place, that's where  
16 I'd like it to be.

17 THE DEFENDANT: Thank you.

18 THE COURT: Upon release, the defendant will be  
19 placed on supervised release for a term of five years. After  
20 his release, the following conditions shall apply:

21 Within 72 hours of release from custody of the Bureau  
22 of Prisons, the defendant shall report in person to the  
23 probation office in the district where he's released unless  
24 his probation officer instructs him differently.

25 The defendant shall comply with the standard

1 conditions of supervised release adopted by the Court.

2                   The defendant shall not commit any crimes under  
3 federal, state or local law.

4                   The defendant shall not possess a firearm or any  
5 other dangerous device.

6                   The defendant shall not possess a controlled  
7 substance except as prescribed by a physician.

8                   The defendant shall cooperate in the collection of a  
9 DNA sample as required by the Justice for All Act of 2004.

10                  The defendant shall participate in a program for  
11 substance abuse, including substance abuse testing such as  
12 urinalysis and other testing, and shall undergo a drug/alcohol  
13 evaluation and treatment if substance abuse is indicated by  
14 the testing. The probation officer will supervise the details  
15 of any testing and treatment including the selection of a  
16 treatment provider and schedule.

17                  If inpatient treatment is recommended, however, it  
18 must be approved by the Court unless the defendant consents.  
19 The defendant is not to leave treatment until completion or as  
20 ordered by the Court. While in treatment and after discharge  
21 from treatment, the defendant is to abstain from using  
22 alcohol. The defendant is required to contribute to the cost  
23 of services rendered.

24                  I'm imposing this condition because of the  
25 defendant's use and abuse of alcohol, marijuana, and cocaine

1 as detailed in paragraphs 102 to 110 of the presentence  
2 report, and I believe it therefore serves the statutory  
3 sentencing purposes of rehabilitation, deterrence and public  
4 protection.

5 The defendant is to participate in a mental health  
6 treatment program including a mental health evaluation and any  
7 treatment recommended. The probation officer will supervise  
8 the details of any testing and treatment including the  
9 selection of a provider and schedule. If inpatient treatment  
10 is recommended, however, that must be approved by the Court  
11 unless the defendant consents.

12 The defendant is not to leave treatment until  
13 completion or as ordered by the Court. While in treatment or  
14 taking psychotropic medication, the defendant shall abstain  
15 from using alcohol. The defendant is required to contribute  
16 to the cost of services rendered.

17 I'm imposing this condition because of the mental  
18 health issues that are noted in paragraph 101 of the  
19 presentence report. And especially because of what his  
20 brother said in his letter, his brother Anthony Russell.

21 And he refers to the defendant's devastating mental  
22 illness and depression that has long incarcerated him from  
23 early childhood. He notes that even though the defendant has  
24 received counselling, most notably alcohol and substance abuse  
25 counselling, none of the counselling was provided by a

1 licensed psychiatrist or someone who was sufficiently trained,  
2 he believes, to treat the PTSD and depression that the  
3 defendant suffers from. And he says in kind of an impassioned  
4 plea, Judge Vilardo, I believe that if he is not treated, he  
5 will fall victim to an even more tragic end.

6 And that is -- I mean, that's obviously a brother who  
7 loves his brother very much, who knows him better than I do,  
8 and who thinks that he needs some mental health treatment. So  
9 I've imposed this condition largely based on what your brother  
10 said. And I believe that serves the statutory sentencing  
11 purposes of rehabilitation and public protection.

12 The defendant shall submit to a search of his person,  
13 property, vehicle, place of residence or any other property  
14 under his control based on reasonable suspicion and shall  
15 permit confiscation of any evidence or contraband discovered.

16 I'm imposing this condition because the offense --  
17 one of the offenses to which the defendant pled guilty  
18 involves drugs which are very easily concealed, and because I  
19 think that the condition imposed serves the statutory  
20 sentencing purposes of deterrence and public protection.

21 After considering the factors set forth in 18, United  
22 States Code, Section 3664(a) and 3664(f)(2), the defendant  
23 is -- I order the defendant to make restitution to BI, Inc.  
24 which is the provider of the ankle monitor in the amount of  
25 \$575. Interest is waived. That restitution is due

1 immediately.

2                   If the restitution is not paid when he's placed on  
3 supervision, the defendant shall make monthly payments at the  
4 rate of at least 10 percent of his monthly gross income.  
5 Payments to be made to BI, Inc., attention accounts receivable  
6 restitution, 6265 Gun Barrel Avenue, Suite B, Boulder,  
7 Colorado 80301. And the restitution shall be paid in full by  
8 the end of the first year of supervised release.

9                   The defendant shall pay to the United States a  
10 mandatory special assessment of a total of \$200, that is \$100  
11 on each count. Payment shall be made to the clerk, United  
12 States District Court, attention finance, United States  
13 Courthouse, 2 Niagara Square, Buffalo, New York 14202.

14                   If the special assessment is not paid when the  
15 defendant is incarcerated, payment shall begin under the  
16 Bureau of Prisons Inmate Financial Responsibility Program.

17                   So in determining the sentence, I've given this a lot  
18 of thought. I've reviewed the circumstances of the case. I  
19 reviewed the plea. I began with the guidelines as I must.  
20 I've considered the fact that both sides asked for the same  
21 sentence here, which I did not impose, which I imposed a  
22 little bit higher than, and I'm going to give the reasons in a  
23 second. And the reasons largely relate to the sentencing  
24 factors that I stated earlier from Section 3553(a).

25                   I'm not imposing a fine. I'm not imposing the costs

1 of imprisonment or the costs of supervised release. I'm not  
2 imposing any costs other than the special assessments and the  
3 restitution, both because I don't believe you have the  
4 financial ability to make those payments, also because of what  
5 I would see to be a disproportionate impact to the people  
6 outside who probably would help you make those payments, who  
7 love you and who are suffering enough because you're not going  
8 to be in their lives for a significant period of time.

9 So this is a serious crime. I mean, there were very  
10 large amounts of drugs involved, made all the more serious as  
11 Mr. Lynch points out because of the possession of a weapon at  
12 one of the drug transactions, a weapon that you were not  
13 entitled to have because of your prior convictions. And then  
14 made even more serious than that by your flight.

15 And so I determined the sentence, I portioned the 108  
16 months into 84 months and 24 months, because what I did was I  
17 looked at the guidelines range without any flight, so just the  
18 guidelines range without anything at all, and I saw that the  
19 low end of that guidelines range was 84 months.

20 And then I asked myself, what additional penalties  
21 should be imposed for the flight, during the course of the --  
22 the charges. And I said 24 months for that.

23 And so that's how I came up with 108 months, which is  
24 toward the low end of the guidelines but not at the low end of  
25 the guidelines.

1                   I factored into my consideration the fact that you  
2 have a long and involved criminal history dating back to when  
3 you were 15 years old in 1992. There's a robbery in which a  
4 codefendant brandished a weapon. There's the battery of a  
5 female. There's physically resisting arrest. There's  
6 possession of a loaded firearm. And there's more. There's  
7 about half a dozen violations of parole or probation.

8                   And -- and you have a criminal history category of IV  
9 on a scale of I to VI, and that is not good.

10                  So when I look at the nature and the seriousness of  
11 the offense, the offenses, when I look at your history and  
12 characteristics, the need to make you understand and to  
13 promote respect for the law, the need to provide a fair  
14 punishment, the need for deterrence, the need for consistency  
15 in sentencing, I think that they all call for a significant  
16 term of imprisonment and a guideline sentence and something  
17 that's below the very -- I'm sorry, above the very low end of  
18 the guidelines, slightly above, it's not a lot above, but  
19 enough above that it makes a statement that I think that the  
20 very low end of the guidelines is too lenient here.

21                  I also take into account the fact that almost all  
22 these crimes, as your lawyer points out, are related to  
23 alcohol and marijuana. Almost every single -- and the  
24 violations of probation and parole are almost all related to  
25 alcohol and marijuana.

1                   I read the letters from your family, and they say  
2 essentially what your lawyer said about you, that you can be  
3 two different people. When you drink -- when you drink,  
4 here's what happens. In your words, in the presentence  
5 report, I was saying to my staff, this is one of the most  
6 remarkably insightful things that I've ever read a defendant  
7 saying in a presentence report, and you actually said this to  
8 the probation office back in 2015. You said I'm not a bad  
9 person, I'm just bad at making good decisions.

10                  That is -- that's in it in a nutshell. That's it in  
11 a nutshell.

12                  And the reason you're bad at making good decisions is  
13 because of this demon alcohol that has gotten into your life,  
14 and I think you need to get control over it. And I hope that  
15 this is a wake-up call to you so that you can get control over  
16 it.

17                  And that's why I've recommended the RDAP program,  
18 because I'm hoping that that will, you know, get you started  
19 on the road to sobriety. I'm hoping that this -- this family  
20 that loves you so much will be on your mind and keep you on  
21 the road to sobriety. Those kids that you love so much.

22                  So, your family says you're a good family man and a  
23 good father. You can't be a good family man and sell drugs,  
24 and you can't be a good family man and drink.

25                  You can't let the alcohol and selling drugs be more

1 important to you than those kids, and the brothers and  
2 sisters, and your mom, and everybody. That's got to come  
3 first.

4 So get some pictures of your kids and put them next  
5 to your bed. When you wake up every day, when you're in jail  
6 and when you're out, tell yourself I'm not going to drink  
7 because of them. Because they're watching me. Because  
8 they're going to -- and they're going to follow me as a role  
9 model.

10 And you can do it. But you've got to get past this  
11 damn alcohol addiction and the drug addiction that's turned  
12 you from the straight and narrow to doing this stuff that has  
13 you in front of me today.

14 When I -- I don't recommend the RDAP program lightly.  
15 I almost never recommend it. People ask me to recommend it  
16 all the time, and I don't recommend it lightly.

17 The reason I'm recommending here is because I've seen  
18 that you've tried to rehabilitate yourself. You went in 2008,  
19 in 2013 and '14, in 2016, in 2017, you tried. And you made  
20 some strides. You know, one step forward, two steps back,  
21 unfortunately, and you ended up relapsing.

22 I see someone who's trying that hard and I say he  
23 deserves a chance. That's why you got the RDAP recommendation  
24 from me, because I think you deserve a chance to really beat  
25 this thing. But you've got to want to beat it. You've got to

1 want to beat it. And I'm hoping the RDAP program will get you  
2 started on that, and I'm hoping that once you get out the  
3 conditions of supervised release that I have in place will  
4 help you get out from under it as well.

5 So, we're all pulling for you and we all think you  
6 can do you it. I've -- I've -- I've tried to fashion a  
7 sentence that I think will give you the tools to do it, but  
8 you've got to do it yourself, and I hope you will.

9 I've imposed the high end of supervised release, five  
10 years with special conditions, so that those conditions will  
11 help you return to society after your incarceration. But it's  
12 also imposed so that the probation office can keep an eye on  
13 you for those five years and make sure that you don't commit  
14 further illegal conduct that has you -- the sort of conduct  
15 that has you in front of me today.

16 So in sum, based on the guidelines, based on the  
17 positions of the parties, based on my review of all the facts  
18 and circumstances of this case, based on all the letters that  
19 your family members wrote about you and everything that I've  
20 learned about you over the past several days as I've read all  
21 this, I think that the sentence I have imposed is sufficient  
22 but not greater than necessary to comply with the purposes of  
23 sentencing in 18, United States Code, Section 3553(a) (2). And  
24 although I'm not bound to do so, I have imposed a sentence  
25 within the applicable guidelines range.

1 Pursuant to Rule 32(j)(1)(B) of the Federal Rules of  
2 Criminal Procedure, I now advise you of your right to appeal.

3 You have a statutory right to appeal your sentence  
4 under certain circumstances, particularly if you think the  
5 sentence is contrary to law. A defendant may waive those  
6 rights as part of a plea agreement.

7 As I think you recognize, Mr. Russell, you entered  
8 into a plea agreement in which you waived some of your rights  
9 to appeal, specifically your right to appeal a sentence that  
10 falls within or is less than the calculated guidelines range  
11 of imprisonment.

12 Waivers like these are generally enforceable. If you  
13 think the waiver is unenforceable, you can present that theory  
14 to the appellate court.

15 If you want to attempt to appeal some issue that you  
16 think survives your waiver, you must file a notice of appeal  
17 within 14 days.

18 If you're unable to pay for the cost of appeal, you  
19 can apply for leave to appeal in forma pauperis, that is leave  
20 to appeal without paying costs.

21 You have the right to be represented by counsel in  
22 any appeal. If you can't afford counsel, you have the right  
23 to have counsel appointed to represent you free of charge.

24 Mr. Lynch, you have a motion?

25 MR. LYNCH: Yes, Judge, I move to dismiss the open

1 counts against Mr. Russell in indictment 17-cr-0040 and  
2 18-cr-105.

3 THE COURT: Okay. That motion is granted.

4 Anything further, Mr. Lynch?

5 MR. LYNCH: No, Judge.

6 THE COURT: Anything further from the defense?

7 THE DEFENDANT: No, Your Honor.

8 MR. FOTI: No, Judge.

9 THE COURT: Okay.

10 USPO HARRINGTON: Your Honor? I'm sorry to  
11 interrupt. There's just a couple things I want to clarify.

12 THE COURT: Go right ahead.

13 USPO HARRINGTON: The \$575 repayment to BI, I just  
14 want to verify that that's being imposed as a special  
15 condition of supervised release and is not restitution.

16 THE COURT: Okay. Yes.

17 USPO HARRINGTON: Okay. So it is -- I'm going to put  
18 it in the J and C as part of a special condition.

19 THE COURT: That's fine.

20 USPO HARRINGTON: And secondly, I wanted to make sure  
21 we address that there is a forfeiture --

22 THE COURT: I was just going to say that.

23 USPO HARRINGTON: Okay. Sorry.

24 THE COURT: The forfeiture will be made a part of the  
25 judgement.

1 USPO HARRINGTON: Okay. Thank you, Your Honor.

2 THE COURT: Okay. Yep. Thank you.

3 The statement of reasons shall be included in the  
4 judgment and shall be provided to the probation office, to the  
5 Sentencing Commission, and to the Bureau of Prisons.

6 A complete copy of the presentence report shall be  
7 provided to the probation office, to the Sentencing  
8 Commission, and to the Bureau of Prisons.

9 Any other copies of the report and related materials  
10 shall remain confidential.

11 And as I said earlier, if an appeal is taken, counsel  
12 will have access to the report except for the recommendations  
13 section at the end of the report.

14 A judgement of the conviction should be prepared  
15 promptly on the form prescribed for judgements, including  
16 sentences under the Sentencing Reform Act.

17 And the defendant is remanded to the custody of the  
18 United States Marshals.

19 Good luck to you, sir. I hope that the programs that  
20 they have inside will help you, and I hope that the programs  
21 that you engage in outside once you're released continue that  
22 rehabilitation and that you end up doing what I know you can  
23 do, and that is being a very productive member of society and  
24 a good father and a good brother and a good son.

25 THE DEFENDANT: Thank you, Your Honor.

1 THE COURT: So I hope that works. Thank you.

2 (Proceedings concluded at 3:07 p.m.)

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1 CERTIFICATION  
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8I certify that the foregoing is a  
correct transcription of the proceedings  
recorded by me in this matter.9 s/ Ann M. Sawyer  
10 Ann M. Sawyer, FCRR, RPR, CRR,  
11 NYRCCR, NYACR, Notary Public  
Official Reporter  
U.S.D.C., W.D.N.Y.  
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